

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21**

GRUMA CORPORATION
d/b/a MISSION FOODS, INC.

Employer

and

Case 21-RC-20685

WHOLESALE AND RETAIL FOOD
DISTRIBUTION, TEAMSTERS LOCAL 63,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was conducted before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Acting Regional Director.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act, and seeks to represent certain employees of the Employer.

4. As more fully set forth below, no question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

OVERVIEW

The Petitioner seeks to represent a unit of all regular full-time distributors located at the Employer's facilities at 628 North Gilbert Street, Fullerton, California; 5533 E. Olympic Blvd., Los Angeles, California; 11559 Jersey Blvd., Rancho Cucamonga, California; and 3800 West Van Owen, Burbank, California; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined by the Act.

The Employer contends that the petition should be dismissed because the distributors are independent contractors and not statutory employees within the meaning of Section 2(3)

of the Act. The Petitioner contends that the distributors are statutory employees.

As further discussed below, I have concluded that the distributors in the petitioned-for unit are independent contractors and not employees, where, among other things, the distributors set their own schedules, hire and set terms and conditions of employment for helpers and replacements, have no guaranteed income, are not directly supervised by the Employer, have a proprietary interest in their vehicles and routes, and make decisions that involve risks resulting in operating at a profit or loss. Accordingly, I will dismiss the petition.¹

A. Facts

1. The Employer's Operations

The Employer is a Nevada corporation, engaged in the business of making and selling tortillas, tortilla chips, and related products. The Employer's customers consist of supermarket chain stores, such as Vons and Luckys, as well as

¹ As I have found the bargaining unit petitioned for consists only of independent contractors, I need not rule on the Employer's alternative contentions that the distributors are supervisors within the meaning of Section 2(11) of the Act; and/or that the only appropriate unit would be a nationwide unit.

independent markets. The Employer's customer-service areas are subdivided into various geographical sales territories.

2. Agreements between the Employer and distributors

Since 1993, the Employer and each distributor have entered into a "Store Door Distributor Agreement," hereinafter called the Agreement. The Agreement sets forth the terms of the contractual relationship between the Employer and the distributors. Each Agreement assigns a sales territory to an individual distributor.

The Agreement states that the distributors are independent contractors; that the distributors have the sole control over the means and manner of the performance of their work; and that the distributors shall hold themselves out to interested parties as independent contractors.

The Agreement also states that distributors may sell non-competing products, but they may not sell competing products.

The Agreement requires the distributors to provide "Adequate Service" to customers. Adequate Service is defined in the Agreement as "such service as is reasonably expected by [d]istributor's customers and as is necessary to preserve the reputation of the Products for freshness and high quality."

The Employer may terminate the Agreement based on the distributor's failure to provide "Adequate Service," or because of a major contract violation, such as theft.

Since 1993, the Agreement has been modified and/or amended to include an arbitration provision, as well as to incorporate changes in the insurance requirements the Employer places on the distributor (discussed below). Evidence was presented at the hearing that certain distributors felt pressured into signing the modified/amended Agreements.

3. Duties

The distributors order product from the Employer, pick up the product at a distribution center, load it onto their vehicles, and then deliver/sell the product to customers.

With regard to ordering, the distributors use a hand-held computer supplied by the Employer to place orders with the Employer, and will typically place the orders 2 to 3 days in advance of the pick-up/delivery date. The distributors order product based on how much the customer requests, and/or how much product the distributors think their customers will need.

With regard to picking up the product, the distributors will go to a distribution center² to pick up their load. The distributors are responsible for loading the product onto their own vehicles. The Employer's distribution facilities have opening and closing times (window periods), which vary by facility, and distributors must pick up their product during the window period. The distributors may pick up their load at any time during that window period.

With regard to delivering the product, the distributor delivers product to its customers pursuant to a schedule devised by the distributors. The distributors set their own start time, end time, and decide which customers will be serviced at what time. The record reveals that some customers will request that the product be delivered during a specified receiving time at the customer's store.

The distributors are not required to call the Employer when they are done making their deliveries, do not have minimum hour requirements, and do not otherwise work under any fixed work schedule.

² Most distributors use a distribution center owned by the Employer. These distributors pay a warehouse fee to the Employer. Other distributors, who do not live near a distribution center, will buy or lease their own warehouse

4. Equipment, Uniforms, and Appearance

The Employer does not provide vehicles to distributors. Distributors must buy or lease their own vehicles. The Employer has no requirement regarding the type or size of vehicle driven by the distributors. All expenses connected with the operation of the vehicles are incurred by the distributors, including insurance, repairs, maintenance, and gasoline.

There is no requirement that distributors display the Employer's logo on their vehicles. Distributors can park their vehicles overnight at the Employer's distribution centers, or at their own homes, depending on each distributor's preference.

The record reveals that some distributors own and operate more than one vehicle to service their customers.

The Employer requires distributors to carry minimum insurance amounts on their vehicles, but does not make distributors choose any particular insurance company.

Distributors are not required to wear uniforms, or to display the Employer's logo on their clothing. Distributors can, however, under certain circumstances as defined in the Agreement, use the Employer's logo on equipment and supplies. During the hearing, evidence was presented that

facility, then have the Employer's product shipped to that

one distributor passes out a pen to customers with the Employer's logo and the distributor's name on it.

There are no restrictions imposed on distributors regarding the length of their hair or regarding facial hair.

The Agreement provides that the Employer may, from time to time, without cost, supply to the distributors "reasonable quantities of [the Employer's] advertising and selling literature, drawings, samples, temporary promotional displays, permanent display racks, and other promotion aids and supplies."

5. Compensation

A distributor is not paid an hourly rate or a salary, and receives no guaranteed income. Rather, a distributor's pay is based on how much product the distributor sells.

The distributor buys product from the Employer (on credit) at a wholesale price, and then sells it to the customer for a higher price. If the customer is a retail chain with a credit account with the Employer, the distributor will collect an invoice³ from the customer for the amount purchased and submit the invoice to the Employer. If the customer does not have a credit account with the Employer

facility.

³ The distributor will generate the invoice using a hand-held computer.

(e.g., an independent market), the customer will pay cash to the distributor.

Every two weeks the Employer will add up the amount collected from the invoices of the customers with credit accounts, then deduct from that the amount owed by the distributor to the Employer from purchasing product over that period, and will issue the distributor a settlement check for the difference (i.e. the profit). If the distributor has purchased more product than it has credit in sales for, the distributor will owe the Employer the difference (i.e. the loss).

If the distributor orders product, sells it to the customer, and then the product goes stale on the customer's shelf, the distributor has to buy back the stale product from the customer. The distributor bears the risk of that loss. Accordingly, the record reveals that distributors will make decisions on how to avoid taking losses for stale product.

The Employer takes no deductions from the distributors for taxes, social security contributions, state disability, fringe benefits, insurance health benefits, or vacations. The Employer does not provide workers' compensation insurance/benefits for the distributors.

6. Drivers/Helpers

Distributors are responsible for hiring their own replacement drivers when the distributors are temporarily unable to work because of vacation or illness. The Employer does not assist the distributors in finding replacements or in training the replacements. The Employer does require, however, that it be notified as to who will be replacing the distributor so that the Employer knows who will be picking up the product.

Distributors will also hire helpers to assist them in picking up and delivering products to customers when additional manpower is needed. In addition, the record reveals that some distributors are "absentee owners," i.e. they hire helpers to service their territories for them part-time or full-time. One such absentee owner has other drivers service his routes on the days he operates a separate lunch-truck business that he owns.

The record also reveals that distributors will call upon their relatives to assist them when they need additional manpower.

The terms and conditions of employment of replacement drivers, helpers, and assisting family members are determined solely by the distributor, and the Employer does not take any part in establishing terms and conditions of employment for these individuals. The hiring, firing, and

setting pay rates of these individuals is done exclusively by the distributor.

7. Overstocked Product

On occasion, the Employer will find itself with overstocked product in its warehouses. In those instances, it will ask distributors to buy that product and try to sell it to their customers, a process referred to as "plusing out." If the distributor agrees to buy the overstocked product, but is unable to sell the product, the Employer will purchase it back from the distributor.

8. Customer Complaints, Adequate Service, 48-Hour Notices

As discussed above, the distributors are required under the agreement to provide "Adequate Service."

If a customer is dissatisfied with a distributor's performance, and notifies the Employer of this,⁴ the Employer gives the distributor an opportunity to rectify the situation in the form of a 48-hour notice. If the situation is not rectified, the Employer may choose to terminate the distributor's Agreement or reassign the customer to another distributor.

The record reveals that distributors have received 48-hour notices for actions such as repeated late deliveries,

⁴ A customer may complain directly to the distributor, and the Employer may or may not ever become aware of the complaint.

improper stocking (discussed below), and failing to arrive at the customer's location during the customer's receiving time.

The Employer will visit stores and conduct store surveys to ensure that the distributor is providing "Adequate Service." Among other things, the Employer will look to see if: stocking schematics⁵ are being followed, the section is full, product is being rotated (placed by date), and if there is any stale product. The Employer will then complete a form containing the results of the survey.

9. Entrepreneurial Activities

The Employer and the chain stores determine the prices of the products sold to chain stores.⁶ Distributors can have an impact on the amount of product ordered at the chain stores in that they may suggest to the chain stores an arrangement for new displays, or mixing products, in order to increase the volume of the store's sales. In addition, the distributor can negotiate with the customer to get the customer to order more product.

⁵ The Employer and its retail customers will set stocking schematics, describing the manner in which the product is to be displayed in the customer's store. The record reveals that the retail stores have a legal obligation to ensure all products are stocked in the correct location in accordance with published prices.

⁶ This includes instances when the Employer and chain store agree on a promotional price for a new product or during a holiday.

Distributors, rather than the Employer, negotiate the mark-up on products with independent stores. Distributors may, through their own sales efforts, increase the number of customers within their territory, thereby increasing sales volume and their revenue.

The Employer does not charge a fee to a distributor for a territory when the Employer originally assigns a territory to it. Distributors may buy and sell territories, or parts of territories, and the Employer does not regulate or interfere with these transactions, other than to check the credit of the buyer. The distributors may sell the territory for a profit. The distributors may also negotiate amongst themselves to divide territories assigned to them and/or to alter the boundaries.

B. Analysis and Determination

1. Applicable Standards

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of an independent contractor." The United States Supreme Court in NLRB v. United Insurance Co. of America, 390 U.S. 254 (1968), observed that Congress did not define "independent contractor" in the Act, but intended that the issue should be determined by the application of general agency principles in

each case. According to the Court, "[t]here are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or independent contractor." Id. at 258. The Court further stated that there is no "shorthand formula" or "magic phrase" associated with the common-law test. Id.

In Roadway Package System, Inc., 326 NLRB 842 (1998), the Board reaffirmed that the common law test of agency determines an individual's status as an employee or independent contractor. While acknowledging that the common-law agency test "ultimately assesses the amount or degree of control exercised by an employing entity over an individual," the Board in Roadway rejected the proposition that those factors that do not include the concept of "control" are insignificant when compared to those that do. Id. at 850.

Among the factors considered significant at common law in determining whether an employment relationship exists, according to the Board in Standard Oil Co., 230 NLRB 967, 968 (1977), are:

(1) whether individuals perform functions that are an essential part of the employer's normal operation or operate an independent business;

(2) whether they have a permanent working arrangement with the employer, which will ordinarily continue as long as performance is satisfactory;

(3) whether they do business in the employer's name with assistance and guidance from the employer's personnel and ordinarily sell only the employer's product;

(4) whether the agreement which contains the terms and conditions under which they operate is promulgated and changed unilaterally by the employer;

(5) whether they account to the employer for the funds they collect under a regular reporting procedure prescribed by the employer;

(6) whether particular skills are required for the operations subject to the contract;

(7) whether they have proprietary interest in the work in which they are engaged; and

(8) whether they have the opportunity to make decisions which involve risks taken by the independent businessman that may result in profit or loss.

In Dial-A-Mattress Operating Corp., 326 NLRB 884 (1998), the Board found the owner-operators in question to be independent contractors because, among other factors, the employer had structured its relationship with the owner-operators to allow them to make an entrepreneurial profit; the

owner-operators acquired and maintained (without employer involvement) the vehicles they used; there was no minimum compensation guaranteed; the drivers were held out to the public as independent contractors; and the owner-operators hired their own employees and had sole control over those employees' terms and conditions of employment.

In Teamsters Local 483 (Ida Cal), 289 NLRB 924 (1988), the Board agreed with an administrative law judge's finding that owner-operators were independent contractors because the owner-operators were paid a percentage of the revenue paid by the customer; purchased their own fuel; paid for their vehicle repairs; employed their own drivers; were paid no vacation or holiday pay; and were not provided insurance benefits.

Similarly, in Central Transport, Inc., 299 NLRB 5 (1990), the Board found the owner-operators to be independent contractors because they financed their own vehicles; obtained their own drivers; did not wear uniforms; were paid by the job; paid their own expenses; and were responsible for the payment of taxes and social security contributions.

2. The distributors' independent contractor status

Applying the common-law agency test to the facts of this case, and in light of the similarities between this case and the above-cited Board precedent, I find that the factors

in this matter weigh more strongly in favor of finding independent contractor status for the distributors.

In the instant matter, the distributors set their own schedule, set working conditions for replacements or helpers they hire, and are not required to wear uniforms or place the Employer's logo on their vehicles.

The distributors do not receive a fixed wage rate, a salary, or have a guaranteed minimum income, but instead receive a percentage of the selling price of the products that they distribute. The distributors are responsible for paying their own expenses, as well as their own taxes and social security contributions, and the distributors do not receive any fringe benefits from the Employer.

The Employer lacks any significant control over the distributors once they leave the Employer's facility. The distributors work primarily away from the distribution center, and are not directly supervised by the Employer's personnel when servicing their accounts.

Although the Employer may have a window period for when a warehouse is open, and the customer may have a window period for receiving goods at its stores, I find that the window periods still provide the distributors with discretion and flexibility in deciding their schedules. See Dial-A-Mattress, supra at 892 (employer policy regarding attire still

afforded owner-operators with wide discretion in complying with policy). Moreover, customer requirements for receiving times evidence control by the customer, not the Employer. Central Transport, supra at 13.

Similarly, the fact that the Employer asks that distributors to comply with customer-requested schematics does not establish that the Employer exercises significant control over the drivers. This, again, evidences control by the customer, not the Employer. Moreover, to the extent the Employer asks the distributor to abide by customer-requested schematics in order to ensure the customer's compliance with governmental regulations (product placed under correct price), the Board has held that governmentally imposed rules do not evidence control by an employer, but instead evidence control by a governing body. Don Bass Trucking, 275 NLRB 1172 (1985).

Next, the Employer's ability to counsel distributors and terminate their Agreements based on customer complaints or failure to provide "Adequate Service" does not establish control sufficient to show an employer-employee relationship in and of itself. As mentioned above, the distributors are not directly supervised during the performance of their duties. In addition, customer complaints directed solely to the distributor, without any Employer involvement, evidence a lack of control by the Employer.

Although store surveys are conducted, the Employer's examination of the end-result of a distributor's work would not be inconsistent with the finding of independent contractor status. Finally, actions taken by the Employer, designed to preserve customer goodwill and trade-name value, are also not incompatible with a finding of independent contractor status. City Cab Co. of Orlando, 285 NLRB 1191, 1194 (1987).

Also relevant to the finding of independent contractor status is the fact that the distributors have a significant proprietary interest in the instrumentalities of their work. Specifically, the distributors buy or lease, and maintain, their own vehicles without involvement from the Employer. Some distributors own and utilize more than one vehicle. Such freedom and flexibility further evidences an independent contractor relationship. Dial-A-Mattress, supra, at 891.

Although the Employer ensures that the drivers carry minimum insurance requirements, the Employer does not require that the distributors use any particular insurance company. Moreover, minimum insurance requirements seem to be more about concerns over liability, rather than an issue of control.

Although the Petitioner points to evidence that the Employer provides the distributors with hand-held computers, and/or supplies distributors with materials and supplies (such

as pens) with the Employer's logo on them, these de minimis items do not warrant a finding of employee status in light of other more prevalent factors. See Dial-A-Mattress, supra at 891 (employer provided owner-operators with credit card charge machines, spare bed frames, and two-way radios); Central Transport, supra at 6 (drivers rented two-way radios from employer).

Similarly, I find the fact that even though the distributors that use an Employer distribution center are charged a warehouse fee, this fee is not as significant as other factors in determination of the issue of the distributors' status. See Dial-A-Mattress, supra at 887 (employer deducted \$4 per pay period for use of restroom and lounge facilities at warehouse).

Also of significance in my finding of independent contractor status in this matter is that the distributors in this case have the opportunity to make decisions involving risks that may result in a profit or a loss. The Employer does not guarantee distributors any level of income. Instead, distributors make a myriad of decisions, including: how much product to order, whether to obtain additional vehicles and/or hire helpers, and determining the order of deliveries. In addition, distributors can negotiate with the chain stores to buy more product. Moreover, inasmuch as the distributors may

add customers to territories through their own initiative and efforts, the Employer does not wholly control the customer base. Similarly, the Employer does not control all of the product prices inasmuch as the distributors can determine the prices for products sold to independent markets. Finally, distributors can buy and sell routes for a profit, or negotiate amongst themselves to divide up a territory.

Based upon their decisions and execution, distributors may operate at a profit or a loss, and make entrepreneurial decisions in their day-to-day activities, further evidencing independent contractor status.⁷ Diamond L. Transportation, 310 NLRB 630, 631 (1993); Dial-A-Mattress, supra, at 891-892.

The Petitioner argues that because the Employer and retail customers set the prices of the products, or decide mandatory promotional prices/items, and because the distributors cannot carry products of competitors, these factors evidence employee status. However, contrary to the Petitioner's argument, these factors are not inconsistent with

⁷ I do not agree with the Petitioner's contention that the distributors do not have a significant proprietary interest in the value of their routes. I find that testimony regarding the formula value of a route, based on net sales over a period of time, provides a basis of equity in the route, inasmuch as that value is contemplated in affixing a price to the route in the event of future sale of the route.

the finding of independent contractor status. Dial-A-Mattress, supra at 893.

The Petitioner also argues that the Employer has made unilateral modifications to the Agreement and presented it to the distributors on a take-it-or-leave-it basis, and has a continuing relationship with the distributors, factors evidencing employee status. While these factors may tend to support the finding of employee status, I do not find that they outweigh the more compelling factors set forth above.

The Petitioner cites to the Board's decisions in Douglas Food Corp., 330 NLRB 821 (2000), and Slay Transportation Co., 331 NLRB 1292 (2000), to support its contention that the distributors are employees within the meaning of the Act.

I find these cases to be distinguishable because the factors present in those cases that tipped the scale toward the finding of employee status, are not present in this case. In Douglas Food, the drivers at issue, drove trucks with the employer's logo on them; could not sell or assign their routes, or hire replacement workers, without the employer's approval; and had their vehicles inspected by the employer. Further, there was evidence of direct supervision of employees.

In Slay Transportation, the employer hired the drivers at issue; was responsible for the repair of the trailers used by the drivers; prohibited subcontracting; trained the drivers; and subjected the drivers to the same disciplinary, performance, and attendance standards and procedures as applied to the employer's employee-drivers.

Accordingly, I find that the cases cited by Petitioner are distinguishable from the instant case.

Based on the foregoing, I find that the distributors in the petitioned-for unit are independent contractors and are not employees within the meaning of Section 2(3) of the Act. In these circumstances, I shall dismiss the petition.

ORDER

IT IS HEREBY ORDERED that the petition in this matter be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this

Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. The Board in Washington must receive this request by December 5, 2003. A copy of the request for review should also be served on the undersigned.

DATED at Los Angeles, California, this 21st day
of November, 2003.

James F. Small
Acting Regional Director, Region

National Labor Relations Board

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